

15 MAR 1985

*Handwritten signature*

Gordon Stoner, Esq.  
Room 1734  
U.S. Department of Justice  
Washington, D.C. 20530



John Fleuchaus, Esq. (LE 134-S)  
U.S. Environmental Protection Agency  
401 M Street, S.W.  
Washington, D.C. 20460

Dear Gordon and John:

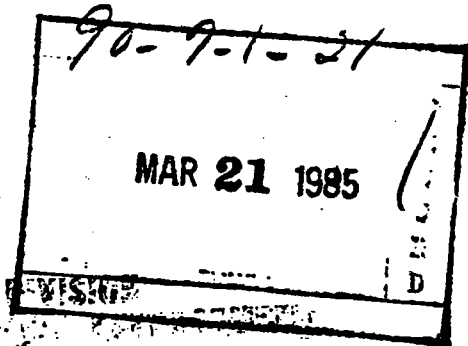
Enclosed herewith for your information is a copy of a Motion for Partial Summary Judgment and a Memorandum in support of such motion which I drafted. This document may be useful in setting forth the elements of CERCLA §107 liability which we are assigned to prepare for the Findings of Fact and Conclusions of Law aspect of our Pre-Trial Brief.

Sincerely,

Robert E. Leininger  
Assistant Regional Counsel

Enclosures

cc: David Eird  
Steve Shakman



**DRAFT**

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its  
Attorney General Hubert H.  
Humphrey, III, its Department  
of Health, and its Pollution  
Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORA-  
TION; HOUSING AND REDEVELOPMENT  
AUTHORITY OF ST. LOUIS PARK;  
OAK PARK VILLAGE ASSOCIATES;  
RUSTIC OAKS CONDOMINIUM, INC.;  
and PHILLIP'S INVESTMENT CO.,

and

CITY OF ST. LOUIS PARK,

PLAINTIFF-INTERVENOR,

VS.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff- Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AGAINST REILLY TAR &  
CHEMICAL CORPORATION

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, the Plaintiff, United States moves for Partial Summary Judgment against Defendant Reilly Tar & Chemical Corporation ("Reilly Tar") on the issue of the Defendant's liability under section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607(a), for costs that the government has incurred and will incur in responding to the conditions at the Reilly Tar site. The Plaintiff is not seeking a determination at this time of the amount of these costs.

As grounds for this motion the Plaintiff avers that there are no material facts as to which there is a genuine issue and that the Plaintiff is entitled to a judgment as a matter of law. These grounds more fully appear in the Memorandum of Points and Authorities in support hereof.

Respectfully submitted,

---

David Hird, Attorney  
U.S. Department of Justice  
Land and Natural Resources  
Division  
Environmental Enforcement  
Section  
Washington, D.C. 20530

Of Counsel:

Robert E. Leininger  
Assistant Regional Counsel  
U.S. EPA, Region V  
230 S. Dearborn  
Chicago, Illinois 60604

Deborah Woitte  
Attorney-Advisor  
U.S. EPA  
401 M. Street S.W.  
Washington, D.C. 20460

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its  
Attorney General Hubert H.  
Humphrey, III, its Department  
of Health, and its Pollution  
Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORA-  
TION; HOUSING AND REDEVELOPMENT  
AUTHORITY OF ST. LOUIS PARK;  
OAK PARK VILLAGE ASSOCIATES;  
RUSTIC OAKS CONDOMINIUM, INC.;  
and PHILLIP'S INVESTMENT CO.,

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

VS.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff- Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT  
AGAINST DEFENDANT REILLY  
TAR & CHEMICAL CORPORATION

Preliminary Statement

In this action the Plaintiff United States seeks, inter alia, to have the Defendant Reilly Tar & Chemical Corporation ("Reilly Tar") adjudged liable under section 107(a) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §9607(a), for costs that the United States has incurred and will incur for actions taken with respect to the Reilly Tar site, located in St. Louis Park, Minnesota, from where hazardous substances were released. The purpose of this motion is to establish, through uncontested facts, that the Defendant, Reilly Tar is liable for costs incurred by the Plaintiff in response to releases or threatened releases of hazardous substances at the Reilly Tar site. The Plaintiff has spent and will continue to spend funds in responding to the conditions at the Reilly Tar site. The Plaintiff is not seeking a determination at this time of the amount of costs incurred. The amount of costs is an issue of damages and is not a necessary element to establish liability under §107(a). 42 U.S.C. §9607(a); United States v. Royal N. Hardage, 28-29, slip Op. Civ. No. 80-1031-W (Dec. 13, 1982, W.D. Okla.). Nor does §107 require Plaintiff to show that those costs were not inconsistent with the National Contingency Plan. 42 U.S.C. §9607(a). It is defendant's burden to show that they were inconsistent. Id. Such a factual dispute, if it exists, is best reserved until the determination of the amount of costs is made -- a determination not sought by this motion.

ARGUMENT

A. The undisputed facts establish Reilly Tar's liability under CERCLA section 107(a).

CERCLA section 107(a) provides in part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(2) any person who, at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;

42 U.S.C. §9607(a).

In order to establish liability pursuant to Section 107(a) (2) of CERCLA, the following elements must be proven:

- (1) the defendant must be a "person";
- (2) the defendant must have owned or operated a facility;
- (3) there must have been disposal;
- (4) of hazardous substances;
- (5) at the facility;
- (6) at the time defendant owned or operated the facility
- (7) there must have been a release or threatened release of hazardous substances from that facility; and
- (8) the United States must have incurred response costs

Reilly Tar, in its Amended Answer to the First Amended Complaint of the United States and its Amended Answer to the Amended Complaint in Intervention of the State of Minnesota has clearly admitted each and every element of proof necessary to establish liability under Section 107(a)(2) of CERCLA (42 U.S.C. 9607(a)(2)).

1. Reilly Tar is a "person".

Section 101(21) of CERCLA (42 U.S.C. 9601(21)) states that a corporation is a person. Reilly Tar, in paragraph five of its Amended Answer to the First Amended Complaint of the United States, admits that it is a corporation and it is, therefore, a "person" under CERCLA.

2. Reilly Tar "owned or operated a facility at which hazardous substances were disposed of".

a) Reilly Tar has admitted paragraph 39 of the State of Minnesota's Amended Complaint in Intervention, which alleges, "Reilly Tar owned or operated a facility at which hazardous substances were disposed of within the meaning of Section 107(a) of the Superfund Act, 42 U.S.C.A. §9607(a)(1981)".

b) Reilly Tar has admitted paragraph 38 of the State of Minnesota's Amended Complaint in Intervention, which alleges, "The Reilly Tar site, the building and equipment operated by Reilly Tar on the site, and the wells, ditches, and other avenues of drainage from the site constitute a "facility" within the meaning of section 101(9) of the Superfund Act, 43 U.S.C.A. §9607(a)(1981)."

c) Reilly Tar has admitted paragraph 35 of the First Amended Complaint of the United States, which alleges, "The Reilly Tar site is a facility within the meaning of Section 101(9) of the Act."

d) Reilly Tar has admitted paragraph 33 of the First Amended Complaint of the United States, which alleges, "The hazardous wastes disposed of upon and into the ground on the Reilly Tar site are hazardous substances as defined by Section 101(14) of the Act."

e) Reilly Tar has admitted paragraph 36 of the State of Minnesota's Amended Complaint in Intervention, which alleges, "Under authority of §3001 of the Solid Waste Disposal Act Amendments of 1980, 42 U.S.C.A. §6921 (1981), the Administrator of the Environmental Protection Agency has promulgated regulations identifying and listing hazardous wastes. Coal tar, creosote, phenol, and numerous other chemicals believed to be in the coal tar and coal tar derivatives discharged to the environment by Reilly Tar are classified as hazardous in the regulations. 45 Fed. Reg. 33,119-33,133 (May 19, 1980), as modified in pertinent part by 45 Fed. Reg. 74,884-892 (Nov. 12, 1980) (to be codified in 40 C.F.R. Part 261). To the extent that Reilly Tar provided wastewater treatment at its facility in St. Louis Park, two sludges resulting from such treatment have been classified by the EPA, in interim final regulations, as



hazardous. These sludges are "bottom sediment sludge from the treatment of wastewaters from wood preserving processes that use creosote and/or pentachlorophenol" and "wastewater treatment sludges generated in the production of creosote". 45 Fed. Reg. 74,884-74,892 (Nov. 12 1980) (to be codified in 40 C.F.R. §§ 261.32-261.33).

F) Reilly Tar has admitted paragraph 37 of the State of Minnesota's Amended Complaint in Intervention, which alleges, "Because coal tar and coal tar derivatives disposed of at the Reilly Tar site have been identified as hazardous under the authority of section 3001 of the Solid Waste Disposal Act Amendments of 1980, they are hazardous substances within the meaning of section 101(14) of the Superfund Act, 42 U.S.C.A. §9601(14) (1981).

3. The disposal of hazardous substances from the Reilly Tar facility occurred at the time Defendant owned or operated the facility.

Reilly Tar, as demonstrated above has clearly admitted that it is a facility, and that the disposal of hazardous substances including coal tar and coal tar derivatives has occurred at the site. The following admissions set forth that such disposals occurred during the 55 years that Reilly Tar owned or operated the facility.

a) Paragraph seven of the First Amended Complaint of the United States alleges as follows: "The activities of Reilly Tar at the Reilly Tar site, including the refining of coal tar and the treatment of wood products, generated chemical wastes.

For 55 years, Reilly Tar handled, stored, treated and disposed of these chemical wastes at the Reilly Tar site." (Emphasis supplied). Reilly Tar answered paragraph seven as follows:

"Admits paragraph 7, but denies that Reilly generated "chemical wastes" as that term is normally used in common parlance; admits and alleges that the refining of coal tar and the treatment of wood products resulted in the generation of waste water and small quantities of waste which were residuals of coal tar."

Although Reilly Tar admits paragraph seven, it denies that it generated "chemical wastes" but admits that it generated wastes which were residuals of coal tar. Since Reilly Tar has already admitted that such wastes are "hazardous substances" under CERCLA, the relevant point stressed herein is that such wastes as admitted by Reilly Tar in paragraph seven, were disposed of during the 55 years that Reilly Tar owned or operated the facility.

b) Reilly Tar, in its answer to paragraph seventeen of the First Amended Complaint of the United States, states "Admits that small quantities of the residuals of coal tar were spilled and leaked by Reilly onto and into the ground at the former Reilly site." Thus, this admission establish that the disposal occurred during the time that Reilly Tar owned or operated the facility.

c) Reilly Tar, in its answer to paragraph 18 of the First Amended Complaint of the United States, states:

"Admits that unknown quantities of the residuals of coal tar generated by the refining of coal tar and the treatment of wood

products exist at present in the ground at and surrounding the former Reilly site."

Reilly Tar, thus admits that coal tar residuals present at and surrounding the site were generated by the refining of coal tar and the treatment of wood products. The defendant, in paragraph seven of its answer admitted that it refined coal tar and treated wood products at the site for 55 years.

4. There has been a release or threatened release of hazardous substances from the Reilly Tar facility.

a) Paragraph 37 of the First Amended Complaint of the United States alleges, "Releases, as defined in Section 101(22) of the Act, of hazardous substances are occurring, have occurred, and threaten to occur from the Reilly Tar site."

Reilly Tar's Answer to paragraph 37 states: "Admits that releases, as defined in Section 101(22) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 occurred during the period of 1917 to 1972."

b) Paragraph 38 of the First Amended Complaint of the United States alleges, "The activities of Reilly Tar have caused the releases and threatened releases of hazardous substances from the Reilly Tar site." Reilly Tar's Answer to paragraph 38 stated:

"Admits that the activities of Reilly between the years 1917 and 1972 resulted in releases as defined in the Act, but denies that releases of hazardous substances are threatened to occur in the future."

Thus, Reilly Tar not only admits that releases of hazardous substances have occurred at the site, but that the activities of

Reilly Tar during the 55 years from 1917 to 1972 resulted in such releases.

5. The United States has incurred response costs for removal and remedial actions at the Reilly Tar site.

a) Paragraph 12 of the First Amended Complaint of the United States alleges that, "Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510 (December 11, 1980), 94 Stat. 2767, 42 U.S.C.A. §§9601 et seq., the United States Government has begun to incur costs in taking actions to repair the harm caused and prevent the future harm posed by the pollution of the groundwater in and around the City of St. Louis Park."

Reilly Tar's answer to paragraph 12 stated: "Admits that the United States has funded certain activities relating to the former Reilly site in St. Louis Park and relating to studies of the groundwater in Minnesota generally, but denies that the costs incurred are reasonable and cost-effective and specifically alleges that such costs were not consistent with the National Contingency Plan."

b) Paragraph 44 of the First Amended Complaint of the United States alleged that, "Since the passage of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, the United States has incurred and will continue to incur response costs, including the costs of removal and remedial actions, as defined in Sections 101(23), 101(24) and 101(25) of the Act, to respond to the hazard created by the release and threatened release of hazardous substances from the Reilly Tar site."

Reilly Tar's answer to paragraph 44 stated:

"Admits that the United States has funded certain activities relating to the former Reilly site, but denies that the costs thereof are reasonable and cost-effective, and specifically alleges that such costs were not consistent with the National Contingency Plan."

Thus, Reilly Tar admits that the United States has incurred and will continue to incur response costs for removal and remedial actions under CERCLA.

Reilly Tar, in its answers to the Amended Complaint in Intervention of the State of Minnesota and the First Amended Complaint of the United States has admitted each element of liability under Section 107(a)(2) of CERCLA. Consequently, the Defendant is liable for all costs of removal and remedial actions incurred by the United States not inconsistent with the National Contingency Plan.

B. There are no Section 107(b)(3) defenses available to

Reilly Tar:

Section 107(b) provides certain affirmative defenses to liability under Section 107(a). This section provides:

- (b) There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by --

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the

defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance, concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs.

These are the only defenses under CERCLA which a person, otherwise liable under Section 107(a), can assert as stated in the pertinent language of Section 107(a) which reads, "Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section ...." 42 U.S.C. §9607(a).

Reilly Tar, in its Answer to the First Amended Complaint of the United States pleads six separate affirmative defenses. None of such affirmative defenses have invoked the provisions of section 107(b)(3) and, therefore, such a defense is unavailable to Reilly Tar.

CONCLUSION

For the foregoing reasons set forth in this memorandum, there being no material fact in dispute, Plaintiff United States' motion for partial summary judgment against Reilly Tar on the issue of liability under section 107(a) of CERCLA should be granted.

Respectfully submitted,

---

DAVID HIRD  
U.S. Department of Justice  
Land and Natural Resources Division  
Environmental Enforcement Section  
10th and Pennsylvania Avenue, N.W.  
Washington, D.C. 20530

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

UNITED STATES OF AMERICA,

Civil No. 4-80-469

Plaintiff,

and

STATE OF MINNESOTA, by its  
Attorney General Hubert H.  
Humphrey, III, its Department  
of Health, and its Pollution  
Control Agency,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORA-  
TION; HOUSING AND REDEVELOPMENT  
AUTHORITY OF ST. LOUIS PARK;  
OAK PARK VILLAGE ASSOCIATES;  
RUSTIC OAKS CONDOMINIUM, INC.;  
and PHILLIP'S INVESTMENT CO.,

ORDER

and

CITY OF ST. LOUIS PARK,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant,

and

CITY OF HOPKINS,

Plaintiff-Intervenor,

vs.

REILLY TAR & CHEMICAL CORPORATION,

Defendant.



Upon consideration of the motion for partial summary judgment of the Plaintiff, United States of America, against the Defendant, Reilly Tar & Chemical Corporation, I find that the Defendant, Reilly Tar & Chemical Corporation has admitted all of the elements which are necessary to establish liability under Section 107(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607(a)(2).

Wherefore, I find that the Defendant, Reilly Tar & Chemical Corporation is liable to the Plaintiff, United States of America under Section 107(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9607(a)(2) for all costs that such Plaintiff has incurred and will incur not inconsistent with the National Contingency Plan in responding to conditions at the Reilly Tar & Chemical Corporation site.

It is hereby Ordered that Plaintiff's motion for partial summary judgment is granted.

ENTERED this \_\_\_\_ day of \_\_\_\_\_, 1983.

---

Judge